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Zoning and the Law of Eminent Domain: Minnesota Adopts the Enterprise-Arbitration Test [McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980)]

COMMENTS

ZONING AND THE LAW OF EMINENT DOMAIN: MINNESOTA ADOPTS THE ENTERPRISE-ARBITRATION TEST

[*McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980)]

I. INTRODUCTION

Federal and state constitutions forbid the taking of property without just compensation.[1] Although the significance of the government taking power is universally recognized and has never been seriously questioned, determining what constitutes a taking and under what circumstances compensation is to be paid has long troubled courts and commentators.[2] In an increasingly complex and crowded society, a recognition of the tension between government regulation and private property rights is central to any cogent analysis[3] of the taking issue.[4] Government regulation

1. The Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." MINN. CONST. art. I, § 13. The United States Constitution essentially is the same except that it does not include the word "damaged." The fifth amendment states: "Nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

Several states have constitutional provisions similar to Minnesota. *See, e.g.*, CAL. CONST. art. I, § 14; ILL. CONST. art. I, § 15; TEX. CONST. art. I, § 17. Other states have constitutional provisions similar to the United States Constitution in that they do not include the word "damaged." *See, e.g.*, MASS. CONST. pt. I, art. 10; MICH. CONST. art. 10, § 2; N.J. CONST. art. I, pt. 20; N.Y. CONST. art. I, § 7; PA. CONST. art. I, § 10; WIS. CONST. art. I, § 13.

2. Professor Sax states: "Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation." Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 (1971); *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978); Note, *A Proposal for Compensating Landowners for the Effects of Urban Redevelopment*, 5 WM. MITCHELL L. REV. 165, 169-70 (1979); notes 3, 74-78 *infra* and accompanying text.

3. Despite the fundamental importance of private property ownership, no particular theory or analysis has gained widespread acceptance to determine whether a property right exists that requires compensation if taken or damaged. *See, e.g.*, Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as Sax, *Police Power*]; Sax, *supra* note 2; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971); Comment, *Airport Approach Zoning: Ad Coelum Rejuvenated*, 12 U.C.L.A. L. REV. 1451 (1965).

United States Supreme Court cases dealing with the taking issue have employed nu-

is necessary to manage and to administer the public's increasing demands on space and natural resources.[5] Without some government regu-

merous theories, ultimately deciding the compensation issue on a case-by-case basis. The economic impact of a government regulation, the character of a government action, the existence of a physical invasion, the presence of legitimate governmental interests in the health and safety of the public, the balancing of the harm to the property owner over the benefit to the public, and whether a government action is a zoning ordinance not depriving the property owner of all beneficial uses of the property are all factors that have been considered by the Court in resolving past cases. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 130-31 (1978) (Court focused on character of government action and nature and extent of interference with property rights); Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-96 (1962) (economic impact of restrictions imposed not onerous or unreasonable enough to give rise to a compensable taking); Griggs v. Allegheny County, 369 U.S. 84, 88-90 (1962) (compensable taking due to appropriation of air easement); United States v. Central Eureka Mining Co., 357 U.S. 155, 165-69 (1958) (temporary restrictions on operation of gold mine did not give rise to a compensable taking; no physical appropriation of property); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952) (strategic destruction of private property during wartime attributed to the fortunes of war did not constitute a compensable taking); United States v. Causby, 328 U.S. 256, 262-67 (1946) (physical invasion by airplane overflights constituted a compensable taking; limited use of land was substantial damage); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (legitimate governmental interests in public health and safety); Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (requiring property owner to cut down his trees not a compensable taking; state was validly arbitrating between conflicting land uses in the public interest); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395-97 (1926) (general zoning regulations that fail to cause a particular injury to individual property owner not a compensable taking); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-16 (1922) (harm to property owner balanced against benefit to public; no taking because diminution in property value insubstantial); Hadacheck v. Sebastian, 239 U.S. 394, 410-14 (1915) (zoning to prohibit brickyard, a noxious use, not a compensable taking); Mugler v. Kansas, 123 U.S. 623, 669 (1887) (prohibiting sale and manufacture of intoxicating liquors, a public nuisance, not a compensable taking).

Professor Sax views the various analyses employed by the United States Supreme Court as unsatisfactory. Professor Sax states:

> The principle upon which the cases [dealing with the taking issue] can be rationalized is yet to be discovered by the bench: what commentators have called the "crazy-quilt pattern of Supreme Court doctrine" has effectively been acknowledged by the Court itself, which has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that "no rigid rules" or "set formula" are available to determine where regulation ends and taking begins.

Sax, *Police Power*, *supra* note 3, at 37 (footnotes omitted).

In Minnesota, the law has been equally unpredictable. In McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980), the Minnesota Supreme Court stated, "The opinion of the trial court and the arguments of the parties indicate to us that there is a great deal of confusion over the standards used to determine whether there has been a taking of private property as a result of governmental regulation of land use." *Id.* at 257.

4. The tension between private rights and governmental regulation is at the heart of the taking issue. The constitutional guarantee of just compensation does not prohibit valid exercise of the police power, but requires the government to compensate only when a taking occurs. Thus, the central issue becomes where to draw the line between mere regulation and a taking.

5. Professor Berger states, "It is not novel to say that, in this ever more complicated

lation, projects beyond the scope of unaided private enterprise would never be initiated, resulting in a net welfare loss to society.[6] As resources become scarce and space more limited individual property owners have become more protective of their property rights and scrutinize government regulation.[7] Government regulation of property to facilitate or promote activities thought to be of greater benefit to the community as a whole may be economically devastating to individual property owners.[8] If compensation is not paid, the consequences not only harm individual property owners, but may also demoralize others to such an extent that effective government regulation becomes more difficult.[9]

In *McShane v. City of Faribault*,[10] the Minnesota Supreme Court adopted a method of analysis that clarifies this state's approach to compensation in cases in which land use is restricted by government regulation. Reasonable zoning restrictions on the use of private property ordinarily are noncompensable exercises of the police power.[11] In a series of recent cases decided prior to *McShane*, the Minnesota Supreme Court held that compensation was required only when restrictions deprived the property owner of *all reasonable uses*.[12] No compensation was due when zoning restrictions merely reduced the number or value of reasonable uses permitted.[13]

The *McShane* court, employing a distinction articulated by Professor Joseph Sax, recognized that zoning ordinances can be divided into two classes, those serving an *enterprise* function and those serving an *arbitration* function.[14] The government is involved in an enterprise when it provides

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and crowded world, governmental activities and regulations, often adversely affecting the interests of private owners, are becoming increasingly pervasive." Berger, *supra* note 3, at 165. *See also* Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (proposing imposition of severe restrictions on activities that cause pollution and overpopulation).

6. The great cost of many government projects, such as roads and airports, indicates that government regulation is necessary in some form. To evaluate the advisability of any specific regulation or project the interplay of possible policies and social goals involved must be examined. *See* Berger, *supra* note 3, at 166.

7. *See* M. FRIEDMAN, CAPITALISM AND FREEDOM (1962). Friedman states that "[e]very act of government intervention limits the area of individual freedom directly and threatens the preservation of freedom indirectly." *Id.* at 36.

8. One need look no further than the current controversy over federal regulation in general to observe the conflict between untrammeled private use of property and the need for regulation. To resolve this basic conflict government restrictions must be perceived as fair, though a definition of the term "fair" is as complex as it is illusive. *See* Michelman, *supra* note 3, at 1218-24. *See generally* E. CAHN, THE SENSE OF INJUSTICE (1949); J. RAWLS, A THEORY OF JUSTICE (1971).

9. *See* Michelman, *supra* note 3, at 1214-18.

10. 292 N.W.2d 253 (Minn. 1980).

11. *See* note 66 *infra* and accompanying text.

12. *See* note 68 *infra* and accompanying text.

13. *See* note 69 *infra* and accompanying text.

14. *See* 292 N.W.2d at 257-58 (citing Sax, *Police Power*, *supra* note 3, at 61-76). By articulating and adopting an analytical framework for judging the taking issue and mak-

for or maintains programs or facilities for which it must acquire money, equipment, or real estate.[15] In contrast, when a government acts to resolve conflicts among private interests, it functions in an arbitration capacity.[16] This analysis, based on the distinction between these two types of government action, has been designated the enterprise-arbitration test.[17] A mechanical application of the test prescribes that when a property owner is injured as a result of a government enterprise activity, compensation is required. When the injury results from an arbitration function, however, no compensation is required.[18]

In *McShane*, the Fairbault-Rice County Joint Airport Zoning Board adopted regulations promulgated by the Minnesota Commissioner of Aeronautics restricting the use, population density, and permissible structures on land located beyond the runways of a city-owned airport.[19] Plaintiffs owned forty-two acres of farm land adjacent to the runways of the Fairbault Municipal Airport.[20] In recent years, commercial development of the surrounding area caused a significant increase in the value of

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ing an attempt to reconcile past decisions based on the enterprise-arbitration distinction, the *McShane* court attempted to supply consistency and predictability to an area of the law that has given rise to a great deal of confusion in the past. *See* 292 N.W.2d at 257-59.

The significance of the *McShane* decision lies not in its uniqueness, but rather in its similarity to a host of other zoning cases. Any attempt to supply a universal approach to zoning will greatly affect city planning and land-use policies. *See* Brief of the League of Minnesota Cities as Amicus Curiae at 1, McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).

15. *See* Sax, *Police Power*, *supra* note 3, at 62-63.

16. *Id.*

17. *See id.* at 61-76. *See generally* 2 R. ANDERSON, AMERICAN LAW OF ZONING (2d ed. 1976); 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING (4th ed. 1981); 2 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN (rev. 3d ed. 1980).

18. *See* Sax, *Police Power*, *supra* note 3, at 63.

19. *See* 292 N.W.2d at 255. The Board has statutory power to administer and enforce airport zoning regulations when the regulations affect land use outside of the municipality. Regulations passed by the Board have the force of ordinances passed by the municipality. *See* MINN. STAT. § 360.063, subd. 3(2) (1980).

The Commissioner of Transportation is authorized to regulate the approach plans for airports within the state as follows:

> The commissioner may recommend an airport approach plan for each publicly owned airport in the state and for each privately owned airport of the publicly owned class and from time to time recommend revisions of any such plan. Each such plan shall indicate the circumstances in which structures or trees are or would be airport hazards, the airport hazard area, and what measures should be taken to eliminate airport hazards. He shall prescribe minimum airport approach and turning standards for airports of various classes, and all airport zoning regulations adopted by any municipality, county, or joint airport zoning board shall conform to such minimum standards.

MINN. STAT. § 360.063 (4) (1980).

20. Shortly before the regulations were passed, highway construction in the area of plaintiffs' land had made the property considerably more valuable as a site for commercial development than it had been previously. Furthermore, the highways had cut plaintiffs' property into three separate parcels making continued use as farming land impractical. *See* 292 N.W.2d at 255-56.

plaintiffs' property.[21] Adoption of the zoning ordinance precluded commercial development, and resulted in substantial diminution in the value of plaintiffs' property.[22] Plaintiffs brought suit seeking an injunction against enforcement of the ordinance, damages, or mandamus to compel the city of Faribault to initiate eminent domain proceedings.[23] The trial court determined that adoption of the ordinance, which caused a substantial decrease in plaintiffs' property value, was an unconstitutional taking for which compensation was required[24] and issued a writ of mandamus to compel the city to initiate eminent domain proceedings.[25] In addition, the trial court awarded attorneys' and experts' fees pursuant to statute.[26]

On appeal, the Minnesota Supreme Court adopted the enterprise-arbitration test, but deviated from the strict application of this test as proposed by Professor Sax. The court held that when land-use regulations, such as the airport zoning ordinance, are designed to benefit a specific government enterprise, compensation must be provided to those landowners whose property has suffered a "substantial and measurable de-

21. There was evidence introduced at trial establishing that plaintiffs had negotiated a lease-purchase agreement pursuant to plans for commercial development. Although plaintiffs did not desire to keep the land themselves, they were actively seeking to arrange a sale to a commercial developer at the time the regulations were enacted. *See id.* at 256.

22. Plaintiffs' experts testified that the financial loss suffered by plaintiffs as a result of the zoning regulations was $360,000, or a 67% diminution in the value of the land. Defendants contended that the total loss was somewhat less. All parties conceded that the loss suffered was substantial. *See id.* at 255-56.

The zoning regulations established two safety zones on plaintiffs' property. In Zone A, the permitted uses included agriculture (the then current use), horticulture, and cemeteries; 6.49 acres of plaintiffs' land was located in Zone A. Above ground structural uses and uses that attract an assembly of persons on the land were forbidden. It was uncontested at trial that commercial development would be out of the question. In Zone B, the restrictions were less severe, but still substantial. The most restrictive provision involved population density requirements, which allowed only 15 persons per acre. In addition, "all public and quasi-public assembly uses, such as churches, schools, hotels, theaters, and hospitals, were forbidden," *id.*; 26.09 acres of plaintiffs' land was located in Zone B. The regulations also restricted the height of structures. *See id.*

23. *See id.* at 255.

24. *See id.*

25. *See id.*

26. *See id.* Section 117.045 of Minnesota Statutes states:

> If a person successfully brings an action compelling an acquiring authority to initiate eminent domain proceedings relating to his real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for his reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred in bringing such action. Such costs and expenses shall be allowed only in accordance with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894 (1971), any acts amendatory thereof, any regulations duly adopted pursuant thereto, or regulations duly adopted by the state of Minnesota, its agencies or political subdivisions pursuant to law.

MINN. STAT. § 117.045 (1980).

cline in market value as a result of the regulations."[27] Based on the trial court's finding that the airport zoning ordinance had caused substantial diminution in the value of plaintiffs' property, the Minnesota Supreme Court affirmed the trial court's holding that the ordinance, if enforced, would constitute a taking without just compensation.[28] The court reversed the trial court's decision to issue a writ of mandamus, ruling that an injunction against enforcement of the ordinance was the proper remedy.[29] The court also reversed the trial court on the award of attorneys' and experts' fees, which are allowed by statute only when an action to compel eminent domain is successful.[30]

This Comment reviews the Minnesota Supreme Court's treatment of the taking issue both prior to[31] and following the *McShane* decision.[32] The conceptual basis for the enterprise-arbitration distinction,[33] as well as its impact on this state's approach to compensation in zoning cases, is discussed.[34] Finally, appropriate remedies for a taking are explored with regard to their effect on city planning and land-use regulation.[35]

II. THE CONSTITUTIONAL STANDARD

The Minnesota Constitution provides that "private property shall not

27. 292 N.W.2d at 258-59.

28. *Id.* at 257-59. Defendant-city contended that plaintiffs failed to exhaust their administrative remedies and therefore could not challenge the zoning ordinances in court. *Id.* at 256. MINN. STAT. § 360.072 (1980) provides that a person aggrieved by an airport zoning regulation must apply for a permit or variance, or pursue administrative appeal before seeking judicial review. The *McShane* court held that administrative remedies need not be pursued if it would be futile to do so. 292 N.W.2d at 256 (citing Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 495, 216 N.W.2d 651, 666 (1974)). Because plaintiffs wanted to sell the property and could not because of its decreased marketability, no "use" for the property had been determined from which to base a request for a variance or permit. 292 N.W.2d at 256.

29. *See* 292 N.W.2d at 259. The *McShane* court stated that mandamus "shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law." *Id.* (quoting MINN. STAT. § 586.02 (1980)). Thus, the court agreed with defendant's position that injunctive relief would provide such a remedy, thereby giving them the option of either repealing the ordinance or instituting eminent domain proceedings. *See id.* For a more detailed discussion of the adequacy of available remedies, see notes 136-56 *infra* and accompanying text.

30. 292 N.W.2d at 260 (citing MINN. STAT. § 117.045 (1980)). Justices Wahl and Yetka dissented on this point. Justice Wahl was of the opinion that the language in Holaway v. City of Pipestone, 269 N.W.2d 28 (Minn. 1978), concerning which takings give rise to a right to inverse condemnation proceedings or injunctive relief, was ambiguous. The ambiguity of prior case law made it unfair to force plaintiffs to bear the litigation expenses involved in seeking a clarification of the instant case. 292 N.W.2d at 260 (Wahl, J., concurring in part, dissenting in part).

31. *See* notes 36-73 *infra* and accompanying text.

32. *See* notes 99-135 *infra* and accompanying text.

33. *See* notes 74-98 *infra* and accompanying text.

34. *See* notes 99-135 *infra* and accompanying text.

35. *See* notes 136-56 *infra* and accompanying text.

be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."[36] The Minnesota Supreme Court, noting that the Minnesota Constitution contains the words "taken, destroyed or damaged," whereas the Federal Constitution speaks only of "taking," has stated that Minnesota law need not be as restrictive as federal law.[37] An analysis of recent Minnesota Supreme Court cases reveals a fundamental division in the court's approach to taking cases based on whether there has been a physical invasion of property rights or a regulation of land use.[38] The *McShane* decision left intact Minnesota law regarding compensation for physical invasion of property rights by a governmental entity, but substantially altered Minnesota law regarding compensation when land use is restricted by government regulation.[39]

III. THE PHYSICAL INVASION TEST

The Minnesota Supreme Court has noted that "[n]ot every economic, social, or other interest or advantage is a property right, the taking of which must be compensated."[40] Only those economic advantages recog-

36. In 1896 the Minnesota Legislature amended the Minnesota Constitution. The amendment added three words to the eminent domain provision. The full provision thus read: "Private property shall not be taken, *destroyed or damaged* for public use without just compensation therefor, first paid or secured." MINN. CONST. art. I, § 13 (amendatory language in italics).

The first Minnesota case to interpret the meaning of the state constitutional language requiring compensation when private property was "destroyed or damaged" was Dickerman v. City of Duluth, 88 Minn. 288, 92 N.W. 1119 (1903). Prior to *Dickerman*, damage to property resulting from a change in the grade of a street was held noncompensable. *See, e.g.*, Abel v. City of Minneapolis, 68 Minn. 89, 70 N.W. 851 (1897); Henderson v. City of Minneapolis, 32 Minn. 319, 10 N.W. 322 (1884). The *Dickerman* court rejected the argument that raising the grade of a street was within the legitimate police power of the state and thus compensation was required. 88 Minn. at 293, 92 N.W. at 1120. Later decisions expanded the scope of the constitutional provision to encompass other types of damage as well. *See, e.g.*, Underwood v. Town Bd. of Empire, 217 Minn. 385, 390, 14 N.W.2d 459, 462 (1944) (compensation awarded where property owner denied access to property resulting from public project); Austin v. Village of Tonka Bay, 130 Minn. 359, 362, 153 N.W. 738, 739 (1915) (compensation awarded where damage caused by erection of embankment in front of private property necessitated by public bridge construction); Sallden v. City of Little Falls, 102 Minn. 358, 360-61, 113 N.W. 884, 885 (1907) (compensation awarded where damage caused by change in grade pursuant to new street construction).

37. Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 481, 216 N.W.2d 651, 659 (1974), *clarified in* 317 N.W.2d 352 (Minn. 1982). The taking provision in the Minnesota Constitution is more comprehensive than the provision in the Federal Constitution. *See* note 1 *supra*. Some states having constitutional language similar to that of the Federal Constitution have given a broader interpretation to the taking clause than has the United States Supreme Court. *See, e.g.*, Thornburg v. Port of Portland, 233 Or. 178, 192, 376 P.2d 100, 106 (1962); Martin v. Port of Seattle, 64 Wash. 309, 316, 391 P.2d 540, 545 (1964).

38. *See* note 43 *infra*.

39. *See* notes 65-73, 99-135 *infra* and accompanying text.

40. Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 485-86, 216 N.W.2d 651, 661 (1974), *clarified in* 317 N.W.2d 352 (Minn. 1982).

nized by law are "property rights."[41] Traditionally, the term "property rights" has included the rights to possess, use, and dispose of property.[42] The *McShane* decision does not alter the rule that a claim for compensation under the physical invasion test is proper when either dispossession or an unreasonable, direct, substantial, and unique infringement on property use causing a definite and measurable decrease in the value of the property results from physical government activity.[43]

In *Alevizos v. Metropolitan Airports Commission*,[44] the Minnesota Supreme Court established the test for determining whether a physical invasion had occurred. Plaintiffs in *Alevizos* sought compensation for the reduction in the value of their property caused by air and noise pollution generated by overflights of airplanes.[45] The trial court denied relief on the ground that no direct, substantial, and unique damage was done to the property.[46] On appeal, the Minnesota Supreme Court reversed and remanded with instructions to apply the guidelines in the opinion.[47] Under the *Alevizos* test, when government action can be characterized as physical, a taking has occurred if two factors are proven: (1) a substan-

41. *Id.* (citing United States v. Willow River Power Co., 324 U.S. 499, 502 (1945)).

42. 298 Minn. at 485, 216 N.W.2d at 661.

43. *See* 292 N.W.2d at 257. Recognition that damage need not result from direct physical invasion came early in the development of state eminent domain principles and has survived to the present. *See id.* The damage suffered, however, must be substantial and "special," as opposed to "general." *See* Wolfram v. State, 246 Minn. 264, 267-68, 74 N.W.2d 510, 512 (1956). The *Wolfram* court recognized that a right to compensation need not be based on direct physical invasion if resulting damage is substantial and special. "Special damages" are those damages unique to a given property owner, as contrasted with "general damages," which are those suffered by other similarly situated property owners. *See id.*

The substantial damage requirement was emphasized in Hendrickson v. State, 267 Minn. 436, 127 N.W.2d 165 (1964). In *Hendrickson*, plaintiff property owners operated a motel located on a two-lane road. The state designated the road a controlled access highway and began construction to convert it. Plaintiffs would have been left with direct access to a service road, but no direct access to the main highway for a considerable distance. *See id.* at 437-38, 127 N.W.2d at 167-68. The court recognized the lack of consensus among courts facing the issue of whether deprivation of access to a public highway constituted a taking for which compensation was required. *See id.* at 444-45, 127 N.W.2d at 171-72. Rather than rule whether plaintiffs had a right to compensation as a matter of law, the court instead left the determination to the trial court as a fact question. Plaintiffs were held to have a right to compensation if their damages were determined to be substantial. *Id.* at 445-46, 127 N.W.2d at 172-73.

In Minnesota, the question of whether there is a compensable taking is a matter of law to be decided by the court. Haeussler v. Braun, 314 N.W.2d 4, 10 (Minn. 1981); Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 484, 216 N.W.2d 651, 660-61 (1974), *clarified in* 317 N.W.2d 352 (Minn. 1982); Thomsen v. State, 284 Minn. 468, 474-75 & n.4, 170 N.W.2d 575, 580-81 & n.4 (1969); *see* Hendrickson v. State, 267 Minn. 436, 445-46, 127 N.W.2d 165, 172-73 (1964); note 63 *supra* and accompanying text.

44. 298 Minn. 471, 216 N.W.2d 651 (1974), *clarified in* 317 N.W.2d 352 (Minn. 1982).

45. *Id.* at 475-77, 216 N.W.2d at 656-57.

46. *Id.* at 485, 216 N.W.2d at 661.

47. *Id.* at 499, 216 N.W.2d at 668.

tial invasion of a property right (2) that results in definite and measurable diminution in market value.[48] The court stated:

> The test . . . that we prescribe will give relief to any property owner who can show a direct and substantial invasion of his property rights of such a magnitude he is deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property.
>
> To justify an award of damages it must be proved that these invasions of property rights are not of an occasional nature, but are repeated and aggravated, and that there is a reasonable probability that they will be continued in the future.[49]

While other courts have applied the two-factor physical invasion test to zoning cases,[50] the Minnesota Supreme Court continues to apply the *Alevizos* physical invasion test only to cases in which dispossession or infringement of property use resulting in definite and measurable diminution in market value is caused by some physical government activity.[51]

Johnson v. City of Plymouth[52] is another Minnesota case decided on the basis of the physical invasion test. In *Johnson*, plaintiff bus company sought compensation for damage to its property arising from road construction.[53] Prior to construction, the bus company had access to its garage at any point on the street because there were no curbs, gutters, or sidewalks.[54] The city built curbs on the block, leaving the company only limited access through designated driveways.[55] The issue in *Johnson* was whether the city's curb construction unduly restricted access to the property and thereby deprived plaintiff of its right of reasonable access.[56]

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48. *Id.* at 485-87, 216 N.W.2d at 661-62; *see* Haeussler v. Braun, 314 N.W.2d 4, 9 (Minn. 1981).

49. 298 Minn. at 487, 216 N.W.2d at 662. In *Alevizos*, the court delineated several specific factors to be considered by the trial court in determining if a taking had occurred. These include potential alternative uses of the property and the effect of the invasion involved on such uses, the topography of the land, proximity to runways, distance from the flightpaths, frequency of overflights, types of airplanes, types of flight patterns employed by the airport, effect of winds, and duration of the invasion. *See id.* at 488 n.5, 216 N.W.2d at 662 n.5.

50. *See id.* at 485-86 & n.3, 216 N.W.2d at 661 & n.3. The *Alevizos* court adopted a definition articulated by the Ohio Supreme Court, which stated:

> The broader view, which now obtains generally, conceives property to be the interest of the owner in the thing owned, and the ownership to afford the owner the rights of use, exclusion and disposition. Under this broad construction there need not be a physical taking of the property or even dispossession; any substantial interferences with the elemental rights growing out of ownership of private property is considered as taking.

Smith v. Erie Ry., 134 Ohio St. 135, 142, 16 N.E.2d 310, 313 (1938).

51. *See* notes 52-64 *infra* and accompanying text.

52. 263 N.W.2d 603 (Minn. 1978).

53. *Id.* at 604-05.

54. *Id.*

55. *Id.*

56. *Id.* at 607.

The court looked to the nature of the property under consideration to determine what constituted reasonable access and concluded that the curb cuts constructed by the city were generous and quite plainly designed with the commercial use of plaintiff's property in mind.[57] Thus, the court held that reasonable access to the property had not been denied by the city.[58]

The reasonable access test in *Johnson* corresponds to the first factor of the physical invasion test, that is, whether a substantial invasion of a property right exists. Plaintiff failed to show a substantial invasion of a property right by failing to prove that reasonable access had been denied. Therefore, the *Johnson* court disposed of the case without addressing the second physical invasion factor, diminution of market value.

In *Haeussler v. Braun*,[59] a recent Minnesota case decided on the basis of the physical invasion test, plaintiff landowners were successful at the trial court level in their action for inverse condemnation, arguing that the erection of sound barriers along an interstate freeway was an improper street use that interfered with their implied easements for light, air, and view over the public streets fronting their homes.[60] On appeal, the Minnesota Supreme Court rejected plaintiffs' argument and held that the construction of sound barriers to reduce noise from an interstate freeway is a proper street use.[61] Thus, in failing to establish improper street use, plaintiffs failed to show substantial invasion of a property right under the first factor of the physical invasion test. Although *Haeussler* could have been disposed of solely on the ground that a substantial invasion of a property right was not shown, the *Haeussler* court addressed the second physical invasion factor, diminution of market value, as an alternative ground for reversal.[62] The court held that plaintiff landowners did not show that their properties had suffered a definite and measurable diminution in market value:

> To meet the second prong of the *Alevizos* test, it is not necessary to prove the actual amount of damage caused to the property as a result of the alleged taking. Neither is it necessary to place a fixed percentage of diminution on the property's market value. That determination is for the court appointed commission, which has the responsibility of de-

57. *See id.*

58. In *Johnson*, the court evaluated the extent of the damage suffered by plaintiffs. Its holding, denying compensation, was based upon the determination that the degree of restriction imposed upon plaintiffs' property was not so great as to constitute a taking under the state constitution. *See id.* In overruling a previous case, Alexander Co. v. City of Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946), the court stressed that regulation could result in a taking if the denial of access was so great as to amount to an unreasonable restriction. 263 N.W.2d at 608.

59. 314 N.W.2d 4 (Minn. 1981).

60. *Id.* at 7.

61. *Id.* at 7-9.

62. *Id.* at 9-10.

> ciding what compensation would be just. To satisfy the *Alevizos* test, all the petitioner need show is that his property has suffered a diminution in property value as a result of the invasion of a property right and that that diminution is definite and measurable.[63]

The *Haeussler* court concluded that "[w]hile a petitioner in an inverse condemnation action need not prove with exactitude the value lost, he must prove with certainty that a loss has occurred."[64]

IV. COMPENSATION FOR REGULATION OF LAND USE PRIOR TO *McSHANE*

In Minnesota, a physical invasion may justify an award of compensation, however, lack of a physical invasion does not preclude compensation.[65] Reasonable zoning restrictions on the use of private property ordinarily are noncompensable exercises of the police power.[66] In a series of recent cases beginning with *Czech v. City of Blaine*,[67] but prior to the holding in *McShane*, the Minnesota Supreme Court held that compensation was required for regulation of land use only when restrictions deprived the owner of all reasonable uses of the property.[68] No compensation was required when the restrictions merely reduced the

63. *Id.* at 10.

64. *Id.* at 11.

65. *See* 292 N.W.2d at 257.

66. *See* Johnson v. City of Plymouth, 263 N.W.2d 603, 606-07 (Minn. 1978); Gibson v. Commissioner of Highways, 287 Minn. 495, 500, 178 N.W.2d 727, 730 (1970); Hendrickson v. State, 267 Minn. 436, 441, 127 N.W.2d 165, 170 (1964); State *ex rel.* Lachtman v. Houghton, 134 Minn. 226, 230, 158 N.W. 1017, 1019 (1916).

67. 312 Minn. 535, 253 N.W.2d 272 (1977).

68. In Czech v. City of Blaine, 312 Minn. 535, 253 N.W.2d 272 (1977), the city zoning ordinance was amended in 1968 to provide that mobile home parks be designated a R-4 use. *Id.* at 537-38, 253 N.W.2d at 273-74. All existing mobile home parks, however, were located in B-3 districts. Therefore, the city council granted special use permits for all existing mobile home parks. In 1970 plaintiff purchased one of the mobile home parks operating by virtue of the special use permits. In 1973 plaintiff purchased an adjacent undeveloped lot for expansion of his mobile home park unaware that the property was zoned B-3. Plaintiff's applications for a special use permit and rezoning were denied. *Id.* at 537, 253 N.W.2d at 273. The Minnesota Supreme Court upheld the zoning ordinance as a valid exercise of the police power, but held that denial of plaintiff's petition to rezone was an unconstitutional taking that deprived plaintiff of all reasonable use of the property. The court based its decision on the trial court's finding that the high water table and nature of the terrain rendered it useless for any other use than as a site for the mobile home park. *Id.* at 540, 253 N.W.2d at 275.

In Holaway v. City of Pipestone, 269 N.W.2d 28 (Minn. 1978), plaintiffs agreed to annexation of their acreage by the city of Pipestone in return for permission to connect to the city water system. *Id.* at 29. Although the property initally was zoned single-family residential, it was rezoned general industrial at the same time the city was considering condemning a portion of the acreage for planned expansion of the municipal airport. *Id.* at 30. The Minnesota Supreme Court noted that plaintiffs had not been deprived of all reasonable uses of the land, but remanded the case to determine whether the zoning classi-

number or value of reasonable uses permitted.[69]

Because *McShane* substantially alters Minnesota's approach to compensation in all cases involving regulation of land use, the *Czech* test should survive *McShane* only in those cases in which the government has acted in an arbitration capacity under the enterprise-arbitration test.[70] Although the Minnesota Supreme Court has not fully defined the standard of harm necessary for compensation when the government acts in an arbitration capacity, the court has stated in dictum that diminution of market value does not create a right to compensation in arbitration cases.[71] *McShane* read in conjunction with *Czech* should result in the following test: when the government acts to arbitrate among conflicting land uses, compensation is required only when a property owner is deprived of all reasonable uses of his land as a result of a regulation.[72] Cases decided subsequent to *McShane* appear to support this conclusion.[73]

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fication had been "used as a tool to depress the market value of the property so as to defeat the payment of a just price when land is taken." *Id.*

In Krahl v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538 (Minn. 1979), plaintiff purchased rural property to construct a repair building for use in his excavation business unaware that he would need to obtain a permit from the watershed district before filling low areas in the property. *Id.* at 540. The watershed district denied permits for two separate construction plans submitted by plaintiff because both plans would have filled more than 20% of the floodplain on plaintiff's property. *Id.* at 542. The *Krahl* court rejected plaintiff's taking argument, stating that plaintiff had not met his burden of showing that he could make no reasonable use of the property. *Id.* at 543.

In County of Pine v. State, 280 N.W.2d 625, 627-28 (Minn. 1979), the Minnesota Supreme Court held that a zoning ordinance that regulated shoreland development along a designated "wild and scenic" river was a valid exercise of the police power. The court reiterated in dictum the "deprivation of all reasonable uses" rule. *Id.* at 630 n.4. *See also* Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (established that regulation by proper exercise of police power does not constitute compensable taking unless it deprives property of all reasonable use).

69. *See* Holaway v. City of Pipestone, 269 N.W.2d 28, 30 (Minn. 1978) (zoning held valid when property was rezoned for commercial use and property owner lost a potential sale of a portion of the property); Beck v. City of St. Paul, 304 Minn. 438, 449, 231 N.W.2d 919, 925 (1975) (zoning ordinances not invalid solely because they result in diminution of property values); Connor v. Township of Chanhassen, 249 Minn. 205, 210, 81 N.W.2d 789, 794 (1957) (zoning ordinances upheld unless clearly unreasonable and arbitrary); State *ex rel.* Howard v. Village of Roseville, 244 Minn. 343, 347, 70 N.W.2d 404, 407 (1955) (government restriction of certain uses of property to promote public health, welfare, safety, and morals is a valid exercise of police power); Alexander Co. v. City of Owatonna, 222 Minn. 312, 324, 24 N.W.2d 244, 252 (1946) (municipalities possess extensive and drastic power to regulate streets), *overruled*, Johnson v. City of Plymouth, 263 N.W.2d 603, 608 (Minn. 1978).

70. *See* notes 109-18 *infra* and accompanying text.

71. *See* Crookston Cattle Co. v. Minnesota Dep't of Natural Resources, 300 N.W.2d 769, 774 (Minn. 1981).

72. *See* authorities cited note 68 *supra*.

73. *See* Crookston Cattle Co. v. Minnesota Dep't of Natural Resources, 309 N.W.2d

V. THE ENTERPRISE-ARBITRATION TEST

A. *Conceptual Basis for the Enterprise-Arbitration Distinction*

Under traditional taking analyses, courts have employed theories that focus on the *effects* of a government activity on the property owner. These theories consider as factors the diminution in value,[74] the presence of a noxious use,[75] and the existence of a physical invasion.[76] These

769, 774 (Minn. 1981); Pratt v. State *ex rel.* Dep't of Natural Resources, 309 N.W.2d 767, 773 (Minn. 1981).

74. Despite inherent difficulties of measurement and identification, an analysis based on the diminution in value test is "probably the most popular current approach to the taking problem." Sax, *Police Power*, *supra* note 3, at 50. The diminution in value test was first used by Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which he stated:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution.

Id. at 413. *See also* Berger, *supra* note 3, at 175-77.

The diminution in value test is unpredictable and uncertain in its application. The test should be employed only as one factor in an analysis of a taking problem. The necessarily general estimates of actual diminution, and the difficulty of determining a consistent point at which the diminution would give rise to the right to compensation are persuasive reasons to avoid applying the test as an exclusive criteria for deciding the taking issue. *See id.* at 177. *See generally* Note, *supra* note 2, at 173-74.

75. The noxious use test has been applied by the United States Supreme Court in several cases. *See, e.g.*, Atchison, T. & S.F. Ry. v. Public Utils. Comm'n, 346 U.S. 346, 353 (1953) (involving railroads and change in grade of roadways); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 432 (1935) (lack of noxious use rendered police power regulations unreasonable); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (regulating operations of brickyard); L'Hote v. New Orleans, 177 U.S. 587, 597-98 (1900) ("lewd" woman prohibited from living in certain sections of city); Mugler v. Kansas, 123 U.S. 623, 662-63 (1887) (prohibiting manufacture of intoxicating liquor); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878) (restricting manufacture of fertilizer).

The problem inherent in the noxious use test is that a determination ultimately rests on a balancing of the property owner's interest in continuing the activity against the public's interest in its abatement. *See generally* Note, *supra* note 2, at 172-73. In a given case, however, it is often difficult to identify or distinguish between an innocent and a "noxious" use. Is the public's distaste for an activity enough, in itself, to brand the use "noxious" even though if conducted in a different location it would be completely innocent? In *Hadacheck*, a brickyard was built on the outskirts of town, only to be surrounded by homes when the town expanded. Which party created the nuisance, the previously innocent brickyard, or the property owners who chose to move nearby? The court in *Hadacheck* denied the brickyard compensation when it was zoned out of existence based on a noxious use analysis. *See* 239 U.S. at 411. In Miller v. Schoene, 276 U.S. 272 (1928), plaintiff was required to destroy his grove of cedar trees and was denied compensation because the trees posed a danger to the health of nearby apple trees. *Id.* at 279-80. Which trees created the nuisance? *See generally* Berger, *supra* note 3, at 172-75; Sax, *Police Power*, *supra* note 3, at 48-50.

76. The physical invasion test also focuses directly on the nature of the infringement imposed on the use of property. The problem with the physical invasion test is that the

traditional analyses fail to consider fairness as an element in the determination and present difficult problems of measurement and application.[77] Professor Sax argues that the diminution in value, noxious use, and physical invasion factors may be useful to determine whether compensation should be paid in a given case. Failure to establish these elements, however, should not bar compensation.[78]

The underlying rationale of the enterprise-arbitration distinction is the belief that courts should look to the *nature* of a government activity rather than the specific effects of the activity on the property owner.[79] A government is acting in an enterprise capacity when it provides for or maintains programs or facilities for which it must acquire money, equipment,

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extent of the infringement is not significant to the analysis. A taking will be found whether the state acquires a few inches of land bordering on a street or appropriates a significant amount of land. In contrast, if a new highway is built resulting in a significant increase in noise or air pollution and no property is directly appropriated, an application of the physical invasion analysis would preclude compensation. On the other hand, if a few inches of land are appropriated with no increase in noise or pollution, compensation would be appropriate. "Under any notion of fairness, the test quickly breaks down." Berger, *supra* note 3, at 171. "As an economic matter the test is also faulty, the government is not forced to take into account, by paying them, the external cost it is visiting upon the parties affected by its activities." *Id.* Finally, resort to mere formalities is "preposterous." Sax, *Police Power*, *supra* note 3, at 48. *See generally* Note, *supra* note 2, at 171.

77. *See* Michelman, *supra* note 3, at 1226. Michelman argues that the courts have, by and large, reached fair results. He adds, however, that the courts should be given assistance from both the legal and general communities since the courts fall short of an adequate level of performance when dealing with the taking issue. *See id*; Sax, *Police Power*, *supra* note 3, at 60.

78. Throughout his article Professor Sax stresses the deficiencies in the traditional approaches to the taking issue. Despite all the deficiencies, the traditional approaches are useful in supplying at least partial measures of values that society as a whole considers important. The physical invasion analysis, though somewhat arbitrary, does reflect the most tangible interference with a person's property. Thus, the physical invasion test is helpful in certain circumstances. *See* Michelman, *supra* note 3, at 1228-29. The diminution in value analysis is useful when the diminution is so drastic that little or no value is left in the property. Despite a lack of physical appropriation the damage is so great that "[n]o one will question that the size of the imposition must be a relevant factor in determining whether compensation should be paid." *Id.* at 1191. The noxious use analysis is rarely applicable due to the difficulty of determining who is doing the harm. When the question is clear, a test of this sort is useful and has received some scholarly support. *See* Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 80.

79. The focus is on whether the government is acting in an enterprise capacity or an arbitration capacity, as opposed to engaging in a direct physical invasion, at least when a zoning regulation is involved. *See* 292 N.W.2d at 257-58. This approach ignores a very basic aspect of the taking conflict. The nature of the activity, whether it be an indirect restriction on certain uses or a more direct prohibition of particular uses, should be a factor in any determination. It can be argued that this problem is addressed by the implicit recognition in *McShane* that when all reasonable use is prevented compensation is required regardless of the character of the government action. In addition, when the government action is of a certain variety, such as a physical invasion, the court never has to reach the enterprise-arbitration analysis. *See id.*

or real estate.[80] When a government acts to resolve conflicts among private interests by defining standards in the community, it functions in an arbitration capacity.[81] Focusing on the nature of the restriction, that is, whether a government is acting in an enterprise or an arbitration capacity, is a more direct and consistent approach than focusing on the effects of a government activity.[82]

A mechanical application of the enterprise-arbitration test prescribes that when a property owner is injured as a result of a government enterprise activity, compensation is required.[83] When the injury results from

80. *See* Sax, *Police Power*, *supra* note 3, at 62-63.

81. *Id.*

82. Applying the test to difficult cases illustrates the advantages of basing the decision on the enterprise-arbitration distinction. The noxious use cases, diminution in value cases, and the physical invasion cases all involve fine distinctions and difficult problems of measurement. In contrast, when the government arbitrates between conflicting uses, Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915), owns or operates the airport, United States v. Causby, 328 U.S. 256 (1946), or regulates mining operations for the protection of the public, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the right to compensation or the lack of such a right is readily apparent. *See* Sax, *Police Power*, *supra* note 3, at 67-70.

83. A difficulty arises in cases in which zoning restrictions identical to those present in *McShane* are passed, not pursuant to a city-owned airport, but rather to facilitate the building of a privately-owned airport. A strict application of the enterprise-arbitration analysis would result in no compensation, regardless of how substantial the resulting loss. The unfairness of such a result is manifest. The *McShane* decision did not adopt this strict application. *See* notes 115-18 *infra* and accompanying text.

Professor Sax, in an article written several years after his article advocating the enterprise-arbitration distinction, abandoned the enterprise-arbitration distinction in favor of a more expansive view of the government's power to restrict uses of property through zoning ordinances. Sax's new theory is based on a broad view of "public rights," which, if furthered by the ordinance, would preclude an award of compensation whenever the prior use of the property had "spillover effects" on other property. *See* Sax, *supra* note 2, at 161. *See also* Berger, *supra* note 3, at 179-82; Michelman, *supra* note 3, at 1201. "Spillover" effects are defined broadly to include any land use that results in a physical restriction on other property, as well as use of a common area to which others have an equal right to use. *See* Sax, *supra* note 2, at 161-65. The rationale behind such a broad view of "public rights" is that

> ecological facts of life demonstrate a powerful inextricability in the utilization of natural resources. If we wish to cope intelligently with the use of resources, we must focus on the nature and degree to which the consequences of any use are disseminated across property, state, and even national boundaries. The law relating to property rights and takings of property ought to begin to reflect this knowledge.

Id. at 155.

The main problem with Sax's most recent theory is that it gives the government an almost unlimited power to regulate and restrict land uses without the obligation to pay compensation. Almost any use of property involves some type of "spillover" effect. It would seem that in the vast majority of cases the government would have "untrammeled power to destroy previously established property values without paying compensation." Berger, *supra* note 3, at 180. "Though this rule would undoubtedly be very convenient for government regulators, it suffers from the very same infirmities as the physical invasion

an arbitration function, however, no compensation is required.[84] Justification for the distinction is based on the dangers inherent in regulation pursuant to the enterprise function of government. Professor Sax identifies three categories of dangers: the risk of discrimination, the risk of excessive zeal, and the enlarged scope of exposure to risk faced by the property owner.[85] When a government is engaged in acquisition processes, it is in a position to select specific industries or properties for regulation. This immense power, when employed by the state, is a compelling justification for protection in the form of a right to compensation.[86] Moreover, a government acts as its own overseer. The checks and balances present when two private concerns compete are not present when the state acts to implement its own projects.[87] Pressures on legislators and government administrators to act prudently may not be great enough to deter action that directly benefits government interests at the expense of private property owners.[88] Finally, when government enterprise preempts private uses, property owners are subject to risks unlimited by competition.[89] The cumulative burden imposed by these special risks justifies a policy that would redress undue hardship caused by governmental restrictions on land use.[90]

When a government is operating in its arbitration capacity, the risks of discrimination, excessive zeal, and disproportionate burdens on individual landowners are not as likely to be present.[91] There is less opportunity for discrimination because the government is acting to "reconcile differences among the private interests in the community."[92] Excessive zeal is less likely to be a factor because no specific government project is being promoted. The scope of risk is limited because the property owner is facing only the competition of another private entity, not the pervasive power and influence of a government.[93] In addition, in situations in which comprehensive zoning plans are initiated, the property owner may derive direct benefits that offset the losses suffered and thus militate against payment of compensation.[94]

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test, to which it is almost identical: unfairness to owners and economic inefficiency." *Id.* at 181.

84. *See* Sax, *Police Power*, *supra* note 3, at 63.
85. *See id.* at 64-65.
86. *See id.* at 65.
87. *See id.*
88. *See id.* at 66.
89. *See id.*
90. *See id.* at 67.
91. *See id.* at 62-63.
92. *Id.* at 63.
93. *See id.* at 62.
94. Referring to cases involving zoning plans, the *McShane* court stated:

> We believe, however, that not all zoning regulations are comparable. The cases discussed so far have involved ordinances designed to effect a comprehensive plan. There is believed to be a reciprocal benefit and burden accruing to all

Under the enterprise-arbitration analysis, compensation turns on who is benefited by the restriction. This approach is subject to criticism. As one commentator states: "[W]hy should it be thought less odious for society to force a landowner to contribute without compensation to the welfare of his neighbors . . . [as a result of the arbitration function] than to the welfare of all of us . . . ?"[95] This question challenges the fundamental premise of the enterprise-arbitration analysis and is not easily dismissed. The test purports not to rely on any question of fault, thus avoiding the problems inherent in a noxious use analysis.[96] The price paid for this advantage, however, is that a government must pay when it acts in the interest of the public at large, this being an enterprise function, and not pay when only a limited number of persons stand to benefit from the restrictions.[97] Perhaps the fact that landowners are more likely to be compensated under the enterprise-arbitration analysis than under prior law sufficiently disarms objections to the test based on conceptual inequities.[98]

B. Application of the Enterprise-Arbitration Distinction in McShane

1. The Enterprise Test

McShane expressly holds that compensation is required when regulation of property use for the benefit of a government enterprise results in "substantial and measurable decline in market value" of the property.[99] The *McShane* court stressed that not all property owners inconvenienced by a zoning ordinance enforced to promote a governmental enterprise

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landowners from the planned and orderly development of land use. We specifically acknowledged "the increasing complexity of society and the realization that property must be viewed more interdependently."

292 N.W.2d at 257 (citation omitted).

95. Michelman, *supra* note 3, at 1201.

96. *See* note 75 *supra*.

97. Professor Michelman uses for illustration of this concept an ordinance regulating highway billboards. If the ordinance restricts height and location so that the public at large benefits from the increase in value of public property, compensation would be paid. If, however, the ordinance forbids signs entirely and only private property owners benefit, then no compensation would be paid. Pardoxically, the less restrictive ordinance requires compensation. Michelman, *supra* note 3, at 1200.

98. An examination of the United States Supreme Court's use of the enterprise-arbitration distinction provides very little additional guidance as to its proper or most useful application. In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), the Court recognized the validity of the enterprise-arbitration distinction. The Court did not, however, treat the character of the government action as controlling. *Id.* at 124-28. For a discussion of the numerous factors considered by the Supreme Court in determining whether a taking had occurred, see note 3 *supra*.

Professor Sax argues for the adoption of a uniform and consistent theory upon which to decide zoning and "taking" cases. He views the various analyses employed by the United States Supreme Court as unsatisfactory. Sax, *Police Power*, *supra* note 3, at 37.

99. 292 N.W.2d at 258-59.

activity would be entitled to compensation.[100] This holding deviates from a strict application of the enterprise-arbitration test as proposed by Professor Sax because of the imposition of a threshold standard of harm.[101]

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100. *See id.* at 259.

101. *See* note 83 *supra* and accompanying text. In *McShane*, the court cited several state court decisions for the proposition that airport zoning ordinances were exercises of governmental enterprise. *See* 292 N.W.2d at 258. This reading is unfounded. These cases speak neither to the scope of the enterprise-arbitration test nor to its proper application. An analysis of these cases indicates that they apply variations of a physical invasion test.

In Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963), the California Court of Appeals considered zoning ordinances similar to those faced in *McShane*. The restrictions, however, were more onerous. The height restriction at one end of the subject property was only four feet. *See id.* at 207, 32 Cal. Rptr. at 319. The court held that an unconstitutional taking had occurred and that plaintiff had a valid cause of action for damages in inverse condemnation. *See id.* at 209, 32 Cal. Rptr. at 320. The focus of the court's analysis was not on the nature of the government activity, but rather on the effect of the ordinances on the particular property owner subjected to the restrictions. The crucial distinction between valid noncompensable exercises of police power through zoning and an unconstitutional taking requiring compensation was the presence or absence of a physical invasion of the airspace above the property. *See id.* at 209-12, 32 Cal. Rptr. at 320-22. The case resulted in a holding similar to that in *McShane*, that is, compensation was compelled if the ordinances were enforced. *See id.* at 212, 32 Cal. Rptr. at 322. This result, however, would be no different whether the restrictions were pursuant to an arbitration or an enterprise activity. In *Sneed*, the court recognized the validity of height restrictions as exercises of police power not requiring compensation. Under an enterprise-arbitration analysis the compensability of such restrictions would turn on the purpose behind the restrictions and the specific beneficiaries of the zoning, not on the presence of "actual use of the airspace zoned, by aircraft." *See id.* at 209, 32 Cal. Rptr. at 320.

In Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (1964), the Idaho Supreme Court focused on whether a property right existed in the property surrounding an airport such that compensation was required. *See id.* at 562, 394 P.2d at 643. The court concluded that "[a] landowner has a property right in the reasonable use of the airspace above his land which cannot be 'taken' for public use without just compensation." *Id.* at 564, 394 P.2d at 645. The issue left unresolved is what constitutes "public use." It is this issue that is most crucial in the enterprise-arbitration analysis. If the court in *McShane* only established that a zoning restriction, passed to facilitate the functioning of a municipally-owned airport, is an enterprise function constituting a "public use," then there can be very little criticism of the case. The *McShane* case cannot be read, however, to support the enterprise-arbitration distinction as a general basis upon which to judge the existence of a right to compensation.

In Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 581, 193 N.E.2d 237, 240 (1963), *cert. dismissed*, 379 U.S. 487 (1965), the Indiana Supreme Court distinguished between "zoning regulations that merely restrict the enjoyment and use of property through a lawful exercise of police power, and a taking of property for a public use, for which compensation must be paid." While this distinction is similar to the enterprise-arbitration distinction it does little to support the test imposed in *McShane*. The emphasis in *Indiana Toll Road* was on whether there was a taking of property rather than on the nature of the governmental activity and the property's "public use." *See id.* at 582-84, 193 N.E.2d at 240-42. The court cited the imposition of building set-back lines as an example of a noncompensable zoning ordinance. *Id.* at 581-82, 193 N.E.2d at 241. In such an instance the

Professor Sax stresses the ease and consistency with which the enterprise-arbitration test can be applied to airport zoning ordinances similar to those in *McShane*.[102] A city-owned airport clearly is an enterprise activity of government. Under Professor Sax's theory, compensation would be awarded whenever the airport zoning ordinances resulted in loss of property value.[103] The ease of application of the enterprise-arbitration test, however, is largely defeated by interjecting a threshold substantial harm requirement. By imposing the standard of "substantial and measurable decline in market value," the *McShane* court has left unresolved what measure is to be used to determine whether the loss suffered is sufficiently direct and substantial to require compensation.[104] The *McShane* standard has not been clarified by the Minnesota Supreme Court in subsequent cases.[105] The determination of substantial loss cannot be based on traditional physical invasion, diminution in value, and noxious use factors because these tests address the substantiality of the invasion, not the substantiality of the decline in market value.[106] The requirement of substantial and measurable decline in market value in enterprise cases is far more stringent than the test applied in *Haeussler v. Braun*,[107] a physical invasion case. To satisfy the *Haeussler* test, "all the petitioner need show is that his property has suffered *a diminution* in property value as a result of the invasion of a property right and that the diminution is *definite and measurable*."[108]

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regulations can be modified by the city. In contrast, if property is appropriated, compensation is required. *See id.* at 582, 193 N.E.2d at 240.

Since the above cases turn on the nature of the infringement itself, and not the character of the government activity, it remains to be seen what types of restrictions are free from the obligation to pay compensation. A clear case of arbitration exists when zoning ordinances are passed to give effect to a "comprehensive plan." *See* McShane v. City of Faribault, 292 N.W.2d at 257. In such cases "[t]here is believed to be a reciprocal benefit and burden accruing to all land owners from the planned and orderly development of land use." *Id.* It is less clear what constitutes a comprehensive plan, and to what extent the presumption of reciprocal benefits and burdens will be upheld in the face of a specific taking challenge brought by a property owner who suffers "special" damage despite the existence of a comprehensive plan. Further clarification from the court is necessary before these questions can be answered satisfactorily.

102. *See* Sax, *Police Power*, *supra* note 3, at 68-69.

103. *See id.*

104. *See* 292 N.W.2d at 257.

105. In Pratt v. State *ex rel.* Dep't of Natural Resources, 309 N.W.2d 767 (Minn. 1981), the Minnesota Supreme Court remanded the case for the submission of evidence and a determination if plaintiff had suffered a substantial diminution in market value on his property by reason of a governmental prohibition on the use of mechanical wild rice harvesters. *Id.* at 774-75; *see* notes 119-28 *infra* and accompanying text.

106. *See* notes 74-76 *supra* and accompanying text.

107. 314 N.W.2d 4 (Minn. 1981).

108. *Id.* at 10 (emphasis added).

2. The Arbitration Test

The *McShane* court did not expressly state whether a restriction in the arbitration context may be so severe as to constitute a compensable taking.[109] In *Crookston Cattle Co. v. Minnesota Department of Natural Resources*,[110] a case decided after *McShane*, the Minnesota Supreme Court stated in dictum that "[w]here regulation operates to arbitrate between competing public and private land uses . . . such regulation is upheld even where the value of the property declines significantly as a result."[111] In a more recent case, *Pratt v. State ex rel. Department of Natural Resources*,[112] the court again stated in dictum that "where the regulation only serves an arbitration function, regulating between private uses for the general welfare, *ordinarily no taking is involved*."[113]

Professor Sax argues that "losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of police power."[114] The inclusion of a threshold harm requirement, however, would be a wise addition to the enterprise-arbitration test. Such a requirement would serve as a check on possible abuse by government officials of the wide scope of compensation-free activity under Professor Sax's arbitration label. Minnesota apparently has implicitly adopted a threshold harm requirement.[115] The following principle can be derived from reading *McShane* in conjunction with the principle first stated by the Minnesota Supreme Court in *Czech v. City of Blaine*:[116] regulation of land use by government acting in an arbitration capacity should result in an award of compensation if the property owner has been deprived of all reasonable uses of the property.[117] If the "deprivation of all reasonable uses" threshold is applied by

109. The *McShane* court cited with approval Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), for the proposition that valid police power regulation does not "constitute a compensable taking unless it deprives the property of all reasonable use." 292 N.W.2d at 247.

110. 300 N.W.2d 769 (Minn. 1981).

111. *Id.* at 774.

112. 309 N.W.2d 767 (Minn. 1981).

113. *Id.* at 773 (emphasis added).

114. Sax, *Police Power*, *supra* note 3, at 63.

115. *See* authorities cited notes 68-69 *supra*.

116. 312 Minn. 535, 253 N.W.2d 272 (1977).

117. *See* 292 N.W.2d at 247. An apparent exception in Minnesota to the enterprise-arbitration analysis arises in zoning for historic preservation. *See* State *ex rel.* Powderly v. Erickson, 285 N.W.2d 84 (1979) (*Erickson I*), *rev'd and remanded with instructions*, 301 N.W.2d 324 (Minn. 1981) (*Erickson II*). In *Erickson I*, decided prior to *McShane*, the Minnesota Supreme Court held there was no unconstitutional taking when a property owner was permanently enjoined under a historic preservation ordinance from demolishing row houses to construct a parking lot. The *Erickson I* court altered the "deprivation of all reasonable uses" rule, stating that an unconstitutional taking results only if *all effective use* of the property is prevented, a standard the court equated with the inability to obtain a reasonable return on the property owner's investment. 285 N.W.2d at 90 (citing Penn

the court in future arbitration cases, the question then becomes one of how to determine whether all reasonable uses have been restricted such that a right to compensation is established.[118]

VI. THE PROBLEM OF MULTIPLE CHARACTERIZATIONS

After *McShane*, the Minnesota Supreme Court has at its disposal three tests with which to categorize government action and ultimately to determine whether an unconstitutional taking has occurred: the physical invasion test, the enterprise test, and the arbitration test. Although these tests are conceptually distinct, rarely does government action fit within neat categories. A physical government activity may have arbitration or

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Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1979)). No evidence was admitted to establish that the value of the property would decrease if plaintiff was not allowed to demolish the row houses. *Id.* Evidence indicated that renovation of the row houses was possible and the plaintiff would obtain a reasonable return on its investment through future rentals. *Id.* Therefore, the *Erickson I* court held that plaintiff had not sustained its burden of proving an unconstitutional taking. *Id.*

The problem created by analyzing zoning for historical preservation under the traditional "deprivation of all reasonable uses" rule is that zoning for historic preservation not only reduces the number or value of reasonable uses permitted, it affirmatively *prescribes* the only permissible use for the property. The *Erickson I* court noted the impact of historical preservation zoning on individual property owners and recommended legislative provision for condemnation proceedings:

> We realize that Erickson cannot be forced to renovate the row houses under the provisions of MERA. Nor can demolition be enjoined indefinitely if Erickson refuses to renovate or sell the houses or if the city does not condemn them. . . . It would seem to be more fair and more efficient in such a case as this for the relevant legislative or administrative bodies to initiate condemnation proceedings with regard to these buildings within a reasonable period of time. Where control or acquisition of property is for the benefit of the many, it makes sense that the cost of the control or acquisition should be borne by all of the taxpayers and not fall on the few directly affected.

Id. at 90-91 (citation omitted).

In *Erickson II*, decided after *McShane*, the court made no mention of *McShane* or the enterprise-arbitration test. The *Erickson II* court reversed *Erickson I*, but retained the injunction ordered to be issued in *Erickson I* until the end of the legislative session to allow the Minnesota Legislature to provide funding and procedures for condemnation for historical preservation. 301 N.W.2d at 327. The *Erickson II* court established a test specific to zoning for historical preservation:

> We indicated in our prior decision that the owners could not be forced to renovate their property, nor could they be enjoined indefinitely from demolishing the buildings if no other solution could be reached. . . . To permanently deny an owner the beneficial use of his property except by requiring him to make a substantial investment in repairs and renovation, over his objection, would constitute a "taking" for which the owner has a right to compensation.

Id. at 326 (citation omitted). The Minnesota Legislature did not respond to the *Erickson* court's suggestion. The row houses were demolished in the spring of 1981.

118. In Hadacheck v. Sebastian, 239 U.S. 394 (1915), a brickyard owner was held to have no right to compensation when the city zoned the use of his property out of existence. *See id.* at 405. If the zoning was an arbitration function of government, the property owner presumably would be entitled to compensation only if there were no alternative uses left for the property. *See id.* at 410-15.

enterprise elements, or both. Complex regulatory schemes may involve government enterprise and arbitration functions. One year after *McShane*, the Minnesota Supreme Court acknowledged this problem in *Pratt v. State ex rel. Department of Natural Resources*:[119]

> In *McShane* we said a taking may be found where a statute or regulation serves a government enterprise and a substantial diminution in market value results. That case, however, presented the situation in which the governmental enterprise function of a regulation was not just predominant but exclusive. Whether a regulation effects a taking is rarely so simple an issue. The presence of multiple purposes for a regulation, as in the instant case, is, we believe, more the rule than the exception, and to be at all useful, the principles enunciated in *McShane* for determining whether a taking has occurred must be applied with some flexibility.[120]

In *Pratt*, plaintiff purchased property containing three sloughs for the purpose of harvesting wild rice by mechanical picker.[121] In 1975, the state advised plaintiff he could no longer harvest wild rice on public waters by mechanical means. Plaintiff brought an action to declare his sloughs private and not subject to control by the state. The trial court found that plaintiff's sloughs had been reclassified from private to public waters by 1973 statutory amendments, thus subjecting wild rice harvests on all public waters to regulation by the state and vesting ownership of the rice in the state.[122] The trial court held that this legislative action constituted a compensable taking because plaintiff could no longer harvest rice by mechanical picker.[123]

On appeal, the Minnesota Supreme Court affirmed the trial court's finding that the sloughs were reclassified from private to public waters in 1973.[124] In determining whether a taking had occurred, however, the court had difficulty classifying the statutory prohibition of mechanical harvesting methods as an enterprise or an arbitration function of government. One purpose of the regulations, to preserve the wild rice harvest for the Indians as an alternative to subsidies, serves an enterprise function. On the other hand, the regulations also serve a conservation function, arbitrating among competing wild rice harvesters to protect against depletion of the crop, which may retard reseeding or endanger waterfowl food supplies.[125] The *Pratt* court concluded that "it would read too much into the legislative intent to characterize the regulations as either *predominantly* enterprise or *predominantly* arbitration. Both purposes are

119. 309 N.W.2d 767 (Minn. 1981).
120. *Id.* at 774.
121. *Id.* at 770.
122. *Id.*
123. *Id.*
124. *Id.* at 770-71.
125. *Id.* at 773-74.

prominent."[126] The court continued, "We think that here, where the governmental enterprise is *prominent*, a taking may occur if the landowner's property is substantially diminished in value."[127] The court remanded for submission of further evidence on the issue of whether there had been substantial diminution in market value of the property by reason of the prohibition of the use of mechanical pickers.[128]

Pratt is the first case in which the Minnesota Supreme Court expressly addressed the multiple characterization problem. Both enterprise and arbitration functions were *prominent* in *Pratt*. The court chose to apply the enterprise threshold standard of harm, substantial and measurable diminution of market value, to the exclusion of the more severe arbitration test, deprivation of all reasonable use. Arguably, this choice in *Pratt* reflects a pattern in recent Minnesota Supreme Court cases: when combinations of physical invasion, enterprise, or arbitration activities are present in a case, and each activity is *prominent*, or not insubstantial, the court has chosen to emphasize the activity with the least severe threshold standard of harm and has applied that test to determine whether a taking has occurred. The apparent policy underlying the court's application of the less severe standard of harm is to increase the likelihood of establishing that a compensable taking has occurred.[129]

The physical invasion test has the least stringent threshold standard of harm: once a substantial invasion of a property right by physical government activity is established, compensation is required if a definite and measurable diminution in market value results. Consistent with this analysis, whenever a physical invasion is shown in combination with enterprise or arbitration functions, or both, the court should emphasize the physical invasion characterization, apply the least stringent threshold standard of harm, definite and measurable decline in market value, and

126. *Id.* at 774 (emphasis added).

127. *Id.* (emphasis in original).

128. *Id.* at 774-75.

129. In *Pratt*, the court noted the importance of observing the "extent of economic damages inflicted, the nature of the economic interests affected, the object of the regulation, and the public policy it serves." *Id.* at 774.

> Pratt's case is unique. Usually the public has access to public waters where wild rice is growing. Here, only Pratt, owner of the riparian rights, has ready access to his lakes. He is the only harvester. Pratt acquired his property for the express purpose of having exclusive harvesting rights at the time when the property contained private waters. Pratt was then free to harvest mechanically. His situation was no different from that of a grower of "domesticated" wild rice, *i.e.*, wild rice grown in private, artificially created paddies, where the grower is free to harvest mechanically. Only now, when the designation of the lakes as public waters has triggered application of the wild rice regulation, does Pratt find his intended use of his property circumscribed and its economic value impaired. This impairment, if substantial, would disproportionately burden an individual property owner for the benefit of the public in the furtherance, at least in part, of a governmental enterprise.

Id.

exclude consideration of the other functions and their more stringent threshold standards of harm. *Crookston Cattle Co. v. Minnesota Department of Natural Resources*,[130] a case decided after *McShane*, supports this thesis.

Crookston Cattle involved statutes regulating proper allocation of groundwater between competing users, an arbitration function, operation of a municipal water works, an enterprise function, and appropriation of underground water resources, a physical invasion.[131] Each purpose could be characterized as *prominent*, or not insubstantial. In *Crookston Cattle*, the Minnesota Department of Natural Resources (DNR) granted the city of Crookston permission to construct two wells that would tap the same groundwater aquifers sought to be used by plaintiff company. Plaintiff's application to construct twelve wells for irrigation purposes on company land lying adjacent to the city's proposed well sites was denied by the DNR "until such time as Crookston Cattle Company can show no adverse impact on higher priority users."[132]

Plaintiff company brought suit, arguing that by granting the city's application for construction of two wells and denying the company's application the DNR deprived the company without compensation of its property right to reasonable use of underground waters.[133] The Minnesota Supreme Court acknowledged the enterprise-arbitration test in the *Crookston Cattle* opinion, but focused its analysis on the physical invasion test.[134] The court held, however, that plaintiff's claims were premature because the DNR permit granted to the city required that the city acquire all necessary property, rights, and interests. Furthermore, no depletion of water resources had as yet occurred. Finally, the court noted that the company's application had not been unconditionally denied. Thus, the court concluded that the DNR order did not constitute a taking.[135]

In summary, a physical invasion in combination with either an enterprise or arbitration function or both will trigger application of the physical invasion test. When physical government activity is not an element in a case, the enterprise test will prevail in combination with an arbitration function, as in *Pratt*.

VII. REMEDIES

In Minnesota, inverse condemnation damages are the appropriate remedy when a taking results from a physical invasion or actual appropriation of property.[136] Prior to the *McShane* decision, when regulation

130. 300 N.W.2d 769 (Minn. 1981).
131. *See id.* at 771-73.
132. *Id.* at 773.
133. *Id.* at 771.
134. *Id.* at 774-75.
135. *Id.*
136. *See, e.g.*, Dugan v. Rank, 372 U.S. 609 (1963); Griggs v. Allegheny County, 369

of land use resulted in a taking the remedy was injunctive relief to prevent enforcement of the regulation.[137] It was unclear whether money damages could be obtained in an action for inverse condemnation in a zoning case.[138] In *Holaway v. City of Pipestone*,[139] a case decided before *McShane*, the Minnesota Supreme Court noted that the appropriate remedy to grant to a plaintiff who succeeds in establishing that an ordinance has "strayed beyond mere regulation" is to declare the ordinance invalid and enjoin its enforcement.[140] The *Holaway* court declined to hold that no right of inverse condemnation exists if the statutory remedy of enjoining enforcement is available, stating, "It may be possible that a zoning ordinance can so interfere with an owner's use of his land as to constitute a taking thereof where inverse condemnation would lie."[141]

The *McShane* court further addressed the remedies issue raised in *Holaway*, holding that injunctive relief is the appropriate remedy in zoning cases unless the damage caused by the challenged regulation is irreversible and an injunction would not return the property owner to his original status.[142] Allowing money damages when the property owner would not be made whole by an injunction is a reasonable compromise between the extremes of never allowing damages in zoning cases and allowing them as a matter of course in all cases in which zoning regulations are determined to be improper exercises of police power.

Policy considerations involved in the remedy issue are discussed at length in *Agins v. City of Tiburon*,[143] a California Supreme Court decision. In *Agins*, plaintiffs purchased property with the intention of developing a residential community. The town of Tiburon zoned plaintiffs' property to allow only one structure per acre in an effort to preserve open space on the outskirts of the town.[144] The zoning regulations resulted in diminution of plaintiffs' property value. The California Supreme Court, however, held that no taking had occurred because the diminution was not significant enough to constitute a physical invasion or appropriation of

U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Hurley v. Kincaid, 285 U.S. 95 (1932); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980); Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 216 N.W.2d 651 (1974), *clarified in* 317 N.W.2d 352 (Minn. 1982); Hendrickson v. State, 267 Minn. 436, 127 N.W.2d 165 (1964).

137. *See* Holaway v. City of Pipestone, 269 N.W.2d 28, 30-31 (Minn. 1978).

138. *Id.*

139. 269 N.W.2d 28 (Minn. 1978).

140. *Id.* at 31.

141. *Id.*

142. *See* 292 N.W.2d at 257, 259-60 & n.6. In *McShane*, the court stated: "Only where the taking or damage is irreversible would an injunction against enforcement not provide an adequate remedy." *Id.* at 259. "We . . . would limit the use of inverse condemnation to cases where an injunction would not restore plaintiffs to their original status." *Id.* at 260 n.6.

143. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

144. *Id.* at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374.

the property.[145] The *Agins* court expressly denied the availability of money damages in suits challenging the constitutionality of zoning ordinances.[146]

The policies supporting the *Agins* decision focus on the adverse effect on municipalities if forced to pay damages not contemplated in the initial decision to adopt a zoning ordinance. Many municipalities would not be able to meet the financial burdens placed on them and may be forced into bankruptcy.[147] Judicial control of purse strings would intimidate zoning decisionmakers, reducing the likelihood of innovative planning.[148] Liability without the option to abandon a challenged regulation, chills the search for solutions to problems of city and suburban expansion and resource depletion.[149] Injunctive relief allows city planners the option of either continuing a project after payment of compensation or abandoning the project in light of unexpected costs.[150] A final argument in support of injunctive relief is that the weighing of costs and benefits arising from zoning regulations is a legislative function that

145. *Id.* at 276, 598 P.2d at 29-30, 157 Cal. Rptr. at 378-79.

146. *See id.* at 278, 598 P.2d at 32, 157 Cal. Rptr. at 379.

In City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978), the Texas Supreme Court sanctioned the availability of money damages pursuant to an inverse condemnation cause of action in a zoning case. In *Teague*, the city refused to grant permits to property owners even though they had met all the stated conditions imposed by the city for issuance of such a permit. The city appealed the trial court's decision to allow money damages. *See id.* at 390. The Texas Supreme Court affirmed the trial court and remanded the case to allow plaintiffs to prove the amount of damages suffered. *Id.* at 395. The court stated that property owners need not suffer a total loss to be entitled to money damages, reasoning that money damages should be awarded to compensate injuries suffered due to "temporary interference with the development and use" of land. *Id.* In *Teague*, plaintiffs had lost all practical use of their land because the city failed to act on plaintiffs' license application. *Id.* at 394. Plaintiffs were singled out "to bear all of the cost for the community benefit without distributing any cost among the members of the community." *Id.* While the fact situation in *Teague* is somewhat extreme, and would probably give rise to money damages under the *McShane* analysis as well, the court clearly stated that money damages are also appropriate in cases in which the loss is not total. *See id.* at 395.

147. *See* 24 Cal. 3d at 276, 598 P.2d at 29-30, 157 Cal. Rptr. at 376-77. *See also* Brief of the League of Minnesota Cities as Amicus Curiae at 1, McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980). The League stated:

> The legal issue of vital interest to the league is whether a complaint, alleging that a rezoning has reduced the market value of plaintiff's land, states a cause of action in inverse condemnation. That issue, if decided adversely to the defendants in this action will have incalculable financial impact on Minnesota cities generally, as well as on other levels of government which are involved in land use planning.

Id.

148. *See* 24 Cal. 3d at 276, 598 P.2d at 29-30, 157 Cal. Rptr. at 376-77.

149. *See id.*

150. *See* McShane v. City of Faribault, 292 N.W.2d at 259; Brief of the League of Minnesota Cities as Amicus Curiae at 18-22, McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).

should not be usurped by the courts.[151] As the *McShane* court stated, "If the city decides it is wiser to close the airport than to spend potentially huge amounts of money on the necessary property rights, clearly it has the discretion to do so."[152]

As a practical matter, however, many property owners may not be willing or able to challenge a regulation unless money damages are recoverable. The financial burden imposed by such a challenge is substantial.[153] Moreover, a literal reading of the constitutional language requiring "just compensation" when property is damaged or destroyed would seem to compel an award of money damages. The question arises whether an injunction to prevent enforcement of an ordinance is "just compensation."[154]

Although decisions in other jurisdictions range from allowing either injunctive or money damages relief to allowing both remedies,[155] the *McShane* court wisely has steered a middle-of-the-road course, restricting the remedy to an injunction in most cases, but leaving the door open for recovery of money damages in cases in which an injunction would not serve to restore the property owner to his original status.[156]

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151. *See* 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377; *cf.* McShane v. City of Faribault, 292 N.W.2d at 259 ("not the function of the trial court to speculate about city's choice"). *But see* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 507-11 (1977).

152. 292 N.W.2d at 259; *see* Davis v. Pima County, 121 Ariz. 343, 345, 590 P.2d 459, 461 (Ct. App. 1978) (allows only invalidation, money damages not an appropriate remedy), *cert. denied*, 442 U.S. 942 (1979); Clifton v. Berry, 244 Ga. 78, 79, 259 S.E.2d 35, 36 (1979) (money damages allowed through inverse condemnation); Ventures in Property I v. City of Wichita, 225 Kan. 698, 714, 594 P.2d 671, 683 (1979) (allowed money damages but gave county the option to either change the regulation or initiate eminent domain proceedings); Village of Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 44, 278 N.E.2d 658, 661-63 (airport zoning restrictions similar to those in *McShane*; court found no taking but stated that if enough diminution in property value was suffered then money damages could be appropriate), *cert. denied*, 409 U.S. 919 (1972).

153. *See* Muir, *California's New Inverse Condemnation Remedies*, 7 ORANGE COUNTY B.A.J. 56, 57-60 (1980).

154. *See id.*

155. *See generally* Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-called Inverse or Reverse Condemnation*, 1 URB. L. ANN. 1 (1968); Ellickson, *supra* note 151; Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 861 (1975); Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 INST. PLAN. ZONING & EMINENT DOMAIN 177; McNamara, *Inverse Condemnation: A "Sophistic Miltonian Serbonian Bog,"* 31 BAYLOR L. REV. 443 (1979); Muir, *supra* note 153; Sackman, *Factors in Inverse Condemnation*, 1978 INST. PLAN. ZONING & EMINENT DOMAIN 369; Stubbs, *Inverse Eminent Domain Resulting from Governmental Action*, 1978 INST. PLAN. ZONING & EMINENT DOMAIN 437; Van Alstyne, *supra* note 3; Note, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569 (1977); Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 STAN. L. REV. 779 (1976); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974); note 152 *supra*.

156. *See* 292 N.W.2d at 259-60 & n.6.

VIII. CONCLUSION

The *McShane* decision is significant in two respects. First, it articulates a new method of analysis for cases involving takings resulting from governmental regulation of land use. The *McShane* court established a right to compensation for substantial and measurable diminution in market value in cases in which the government has acted in an enterprise capacity. Also, implicit in the decision is a right to compensation in cases in which landowners are deprived of all reasonable uses of their property as a result of government arbitration activity. Second, the court established that injunctive relief is the appropriate remedy in zoning cases unless the damage caused by the challenged regulation is irreversible and an injunction would not return the property owner to his original status. The *Crookston Cattle* and *Pratt* cases, decided subsequent to *McShane*, confirm the thesis that when combinations of a physical invasion, enterprise, or arbitration function are present, the Minnesota Supreme Court will apply the appropriate test with the least severe threshold standard of harm, thus affording plaintiffs a greater likelihood of relief when they have suffered particular harm as a result of governmental regulation of land use.